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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DION JAY SUGUITAN, Defendant and Appellant.	E065258 (Super.Ct.No. BLF10000098) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dion Jay Suguitan appeals from an order of the superior court denying his petition to reduce his felony conviction of possession of a controlled substance while in prison (Pen. Code, § 4573.6)[1] to a misdemeanor under the Safe Neighborhoods and Schools Act (Proposition 47). (§ 1170.18, subd. (a).) On appeal, defendant argues that the trial court erred in denying his petition to reduce the offense to a misdemeanor because it falls within Proposition 47 even though it was not specifically mentioned in the text. We disagree and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In October 2009, defendant possessed methamphetamine while confined in state prison.

By felony information on June 17, 2010, defendant was charged with two counts of felony possession of controlled substances, to wit, methamphetamine and heroin, while confined in a state prison in violation of section 4573.6. The information further alleged that defendant had suffered two prior prison terms (§ 667.5, subd. (b)) and 14 prior strike convictions (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)).

On September 22, 2011, defendant pled guilty to one count of possession of a controlled substance while in prison and admitted that he had suffered one prior strike conviction. In return, the remaining allegations were dismissed. On October 19, 2011,

[1] All future statutory references are to the Penal Code unless otherwise stated.

defendant was sentenced to a total term of eight years in state prison to run consecutively to the prison term he was serving.

On July 15, 2015, defendant filed a form petition to have his felony drug possession while in prison conviction designated a misdemeanor pursuant to section 1170.18, subdivision (a). The People filed a form response objecting to defendant's felony reduction on the ground defendant's offense was not a qualifying felony.

On January 4, 2016, the trial court denied defendant's petition, finding a violation of section 4573.6 is not a qualifying felony. Defendant subsequently filed a timely appeal.

II

DISCUSSION

Defendant contends the trial court erred in denying his petition to reduce his conviction for felony possession of a controlled substance while confined in prison in violation of section 4573.6 to a misdemeanor because it falls within the purview of Proposition 47 even though it was not specifically mentioned in the text. We disagree.

When interpreting a voter initiative, we apply the same principles that govern statutory construction. (*People v. Briceno* (2004) 34 Cal.4th 451, 459 (*Briceno*); *People v. Rizo* (2000) 22 Cal.4th 681, 685-686 (*Rizo*).) We first look " ' "to the language of the statute, giving the words their ordinary meaning." ' " (*Briceno* at p. 459; *Rizo* at p. 685.) " 'The statutory language must also be construed in the context of the statute as a whole

and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' " (*Briceno*, *supra*, at p. 459.) We review the trial court's legal conclusions de novo and its findings of fact for substantial evidence. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.)

On November 4, 2014, the voters enacted Proposition 47, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) Proposition 47 "changed portions of the Penal Code and Health and Safety Code to reduce various drug possession and theft-related offenses from felonies (or wobblers) to misdemeanors, unless the offenses were committed by certain ineligible offenders. [Citation.]" (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222, fn. omitted.) The crimes to be so reduced were identified as "Grand Theft," "Shoplifting," "Receiving Stolen Property," "Writing Bad Checks," "Check Forgery," and "Drug Possession." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by the legis. analyst, pp. 35-36.) In addition to reclassifying specified offenses, "Proposition 47 . . . created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added

or amended by Proposition 47. (§ 1170.18, subd. (a).)" (*Rivera, supra*, 233 Cal.App.4th at p. 1092.)

Furthermore, "Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377." (*People v. Contreras* (2015) 237 Cal.App.4th 868, 890.) Specifically, section 1170.18, subdivision (a), provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." To be eligible for resentencing, defendant must be a person "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of his offense. (§ 1170.18, subd. (a).)

Looking to the language of section 1170.18, we observe that the statute lists specific statutes for which a petitioner may obtain resentencing. Section 4573.6 was not added or amended by Proposition 47 and is not among the offenses expressly listed in section 1170.18 as eligible for resentencing from a felony to a misdemeanor. We conclude Proposition 47's listed crimes do not encompass a section 4573.6 crime for

sentencing eligibility purposes. Had the intent of Proposition 47 been to include section 4573.6 as a crime eligible for resentencing, section 4573.6 would have been listed in section 1170.18 or amended. Omission of the crime as one of the listed crimes eligible for resentencing reflects that section 4573.6 was not intended to be one of the crimes eligible for resentencing. Because Proposition 47 has specified which crimes are subject to resentencing, we reject defendant's contention Proposition 47 encompasses section 4573.6. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852) ["The expression of some things in a statute necessarily means the exclusion of other things not expressed. [Citation.] The expression of preclusion by an acquittal excludes preclusion in other regards not expressed." (Italics omitted.)].) We also reject defendant's claim that because section 4573.6 is not listed as among one of the disqualifying offenses in Proposition 47, the voters' intent was to include section 4573.6 as one of the offenses eligible for redesignation to a misdemeanor.[2]

Nor can section 4573.6 be deemed eligible as a lesser included of the offenses specified as eligible by section 1170.18, as the act of possession of a controlled substance *in a penal institution* is an element of the commitment offense but is not an element of any of the drug possession offenses listed in section 1170.18. (See *People v. Clark* (1990) 50 Cal.3d 583, 636 ["An offense is necessarily included in another if . . . the

[2] Section 1170.18, subdivision (i), provides, "The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." Defendant does not have a disqualifying prior conviction.

greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the elements of the greater . . .”].) The trial court correctly determined that defendant’s Penal Code section 4573.6 conviction is not an eligible offense under Proposition 47. Contrary to defendant’s claim, the Legislature and the voters did not intend Proposition 47 to reduce more offenses to misdemeanors than those specifically enumerated. (See *People v. Acosta* (2015) 242 Cal.App.4th 521, 526 (*Acosta*) [enumerating those crimes within the purview of Proposition 47]; accord, *People v. Bush* (2016) 245 Cal.App.4th 992, 1004-1005; *People v. Segura* (2015) 239 Cal.App.4th 1282, 1284.)

Nor is there any merit to defendant’s claim that as a matter of equal protection, his offense should be eligible because it is a “like” offense to those eligible possessory offenses set forth in Health and Safety Code section 11350. “A defendant ‘ “does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.” (*People v. Flores* (1986) 178 Cal.App.3d 74, 88 . . . ; see *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116 . . . [finding the rational basis test applicable to equal protection challenge involving “an alleged sentencing disparity”].)’ ” (*Acosta, supra*, 242 Cal.App.4th at p. 527.) Accordingly, the “rational basis” standard applies to defendant’s asserted constitutional claim. (*Acosta*, at p. 527.) We have no difficulty discerning a rational basis for the electorate to have determined that only personal possession offenses under the Health and Safety Code should be eligible for misdemeanor treatment, and not to have included significantly more aggravated crimes of

possession such as possessing illegal substances in a jail facility. (See *People v. Parodi* (2011) 198 Cal.App.4th 1179, 1185-1186 [rational basis for Legislature to have determined section 4573.6 offense was not " 'nonviolent drug possession' " under Proposition 36].)

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, italics omitted (*Cooley*).) Generally, " ' "[p]ersons convicted of different crimes are not similarly situated for equal protection purposes." [Citations.] "It is one thing to hold . . . that persons convicted of the same crime cannot be treated differently. It is quite another to hold that persons convicted of different crimes must be treated equally." [Citation.]' [Citation.]" (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565, italics omitted.) We recognize that this is not an "absolute rule" and that a state cannot "arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes. [Citation.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871.) The "inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley, supra*, 29 Cal.4th at p. 253.) Here, the two statutes promote two different purposes. Health and Safety Code section 11350 "is designed to protect the health and safety of all persons within its borders by regulating

the traffic in narcotic drugs" (*People v. Clark* (1966) 241 Cal.App.2d 775, 780); section 4573.6, on the other hand, serves the " 'necessary' " purposes of " 'prison administration.' " (*Clark*, at p. 779.) Since the two statutes serve different purposes, defendant is not "similarly situated" (*Cooley*, at p. 253) to one convicted of violation of Health and Safety Code section 11350, and there is no violation of the equal protection clauses.

III

DISPOSITION

The trial court's order denying defendant's section 1170.18 petition is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.